

On the 28th May, no specific player piano had been appropriated to the fulfilment of the contract. Up to that date, the plaintiff company was authorised to select, furnish, and ship the player piano, but on that date its authority so to do was revoked. If the player piano was to be effectively appropriated, there must be an appropriation by the plaintiff, assented to by the defendant.

Reference to Halsbury, vol. 25, para. 301.

The player piano which was completed after the repudiation, and which the plaintiff company assumed to appropriate to the contract after the repudiation, never became a specific article sold to the defendant, and which could be effectively tendered to him—the defendant never having assented to the appropriation.

No action for the price is maintainable until tender by the seller and refusal by the buyer of a specific article legally appropriated to the contract; the only cause of action of the company was for breach of an executory contract, and the recovery could be only for the actual damage resulting from breach of the contract.

Reference to Benjamin on Sale, 5th ed., p. 805; Sedgwick on Damages, 9th ed., para. 752; *Unexcelled Fire-Works Co. v. Polites* (1890), 130 Penn. St. 536.

It was agreed that the claim was on a special contract whereby \$100 became due in any event on the 1st September, 1918; and, upon default, the whole unpaid balance became due. But the whole basis of the contract was the delivery by the plaintiff to the defendant of a piano. The contract did not name a day for delivery; but the law implied that delivery was to be made within a reasonable time; and a reasonable time had elapsed before the 1st September.

Judgment should be entered for the plaintiff company, declaring that the contract had been established, that the defendant had committed a breach of it, and directing a reference to the Master at Chatham to take an account of the loss directly and naturally resulting, in the ordinary course of events, from the breach.

On confirmation of the Master's report, judgment should be entered for the amount found due by it, without any motion on further directions.

The plaintiff company should recover from the defendant its costs of the action down to and inclusive of the trial; no costs of the reference should be allowed to either party.